**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

# CRIMINAL APPEAL No. 510 of 2006

**With**

# CRIMINAL APPEAL No. 511 of 2006

**With**

# CRIMINAL APPEAL No. 512 of 2006

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE R.P.DHOLAKIA**

**HONOURABLE MR.JUSTICE SHARAD D.DAVE**

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

==========

**KARSANBHAI ANDERSING NAYAK - Appellant(s)**
**Versus**
**STATE OF GUJARAT - Opponent(s)**

==========

**Appearance :**

MR SR DIVETIA for Appellant(s) : 1 in all appeals,
MR RC KODEKAR, APP for Opponent(s) : 1, in all appeals

==========

**CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA**

**and**

**HONOURABLE MR.JUSTICE SHARAD D.DAVE**

**Date : 12/07/2006**

**COMMON ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)**

1. These three appeals have been filed by the appellants, original accused Nos.1,2 and 3 respectively in Sessions Case No.41 of 2004, wherein each of the appellants was convicted and sentenced under Sec.302 read with Sec.114 of IPC to suffer rigorous imprisonment for life and a fine of Rs.100/-, in default, to suffer further one month R.I. and for the offence under Sec.135(1) of Bombay Police Act, to suffer rigorous imprisonment for four months with fine of Rs.50/-, in default, to suffer further three months R.I. vide judgment and order dated 21-2-2006.

2. As all three appeals arose from same judgment and order dated 21-2-2006 rendered in

Sessions Case No.41 of 2004 by the Presiding Officer and Addl. Sessions Judge, Fast Track Court No.2, Chhota Udepur, Dist. Vadodara, they were heard together and are being decided by this common judgment with the consent of learned counsel appearing for the respective parties.

3. The case of the prosecution in short is that against the present appellants and one juvenile accused-Valsing Andarsing Naik, a complaint was lodged by the complainant Bhuvansing Shankarbhai Naik with Kwat Police Station on 15-3-2003 for the offence punishable under Secs.302 and 114 of Indian Penal Code and also under Sec.135 of Bombay Police Act registered as Kwat Police Station C.R.No.I-22 of 2003. The complaint was handed over for investigation to PSI, Kwat Police Station. He thereafter made arrangements for inquest panchnama of the deceased and yadi was sent to Executive Magistrate for the said purpose and inquest panchnama Ex.17 was prepared in presence of panchas. Thereafter,

he also prepared panchnama of scene of offence Ex.18 in presence of panchas and also seized muddamal. Thereafter, he prepared yadi Ex.20 for the purpose of performing post mortem of the deceased. Dead body was thereafter sent along with yadi to Kwat Referal Hospital wherein doctor performed post mortem and submitted the report Ex.21. During the course of search of the accused, accused Udaysing Andarsing Naik and Andarsing Chhaganbhai Naik presented themselves before Kwat Police Station where Velji Andarsing produced axe and it was seized under panchnama. Andarsing also produced arrow and vansi (dharia) and same were also seized after completing all formalities including panchnama, etc. and Constable, Rameshbhai produced cloth wore by the deceased at the time of incident and same was also seized under panchnama Ex.19. Two other accused namely, Valsing Andarsing and Karsan Andarsing also surrendered themselves with axe and bow respectively and same were also

seized after completing all formalities. Thereafter, he sent all the muddamals with forwarding note to FSL and on receiving the report from FSL, it was kept in file and also made arrangement to prepare map of scene of offence at Ex.39 and same was also kept in file. He also collected notification Ex.42. During the curse of investigation, it was found that out of four accused, Valsing Andarsing Naik is a juvenile accused and hence, he prepared separate charge sheet and sent to the concerned Court while qua present appellants, he submitted the charge sheet into the court of learned J.M.F.C. Since the learned Magistrate found that the offence alleged against the accused was triable exclusively by Court of Sessions, he committed the case into the Court of Sessions, at Vadodara (Rural) where it was numbered as Sessions Case No.41 of 2004 and transferred into the Court of learned Addl. Sessions Judge and Fast Track Court No.2, Camp at Chhota Udepur, District Vadodara. The

learned Addl. Sessions Judge framed charge against the accused at Ex.11. As the accused pleaded not guilty to the charge and prayed for trial, charge to that effect was framed against them.

4. To prove the charge against the accused Nos.1 to 3, the prosecution examined in all seven witnesses viz., P.W.No.1 Bhuvansing Shankarbhai Naik, Ex.29, who is the son of the deceased, complainant and eye witness; P.W.No.2 Jetliben, widow of Shankarbhai, Ex.31, the eye witness; P.W.No.3 Lallubhai Naykdabhai, Ex.32, through whom prosecution proved recovery panchnama Ex.33 of weapon; P.W.No.4 Fataesingbhai Bhayabhai Rathva, Ex.34, second panch of panchnama Ex.33 of recovery of weapon; P.W.No.5 Hakariyabhai Mokudiyabhai Rathwa, Ex.35, through whom prosecution proved arrest panchnama Ex.36; P.W.No.6 Savjibhai Jerambhai Vaghasiya, Ex.40, PSI of Kwat Police Station, who registered the complaint of the complainant,

investigated the offence and filed the charge sheet and P.W.No.7 Dr.Bharatbhai Jagannathbhai Patel, Ex.43, the doctor at Kwat Referral Hospital who performed post mortem on the dead body of deceased. Prosecution also placed reliance upon various documentary evidence namely, copy of yadi of inquest panchnama Ex.16; inquest panchnama Ex.17; scene of offence panchnama Ex.18; seizure panchnama of cloth of the deceased Ex.19; copy of yadi send for performing post mortem Ex.20; post mortem note of deceased Shankar Chhagan Naik Ex.21; cause of death certificate issued by doctor Ex.22; forwarding letter written by I.O. to FSL Ex.23; receipt issued by FSL Ex.24; FSL report Ex.25; complaint Ex.30, seizure of weapon from accused Exs.33 and 36; map of scene of offence Ex.38; yadi for preparing map at Ex.30 and notification Ex.42. On submission of closing purshis by the prosecution, learned Addl. Sessions Judge,

recorded further statement of three accused under Sec.313 of Cr.P.C. regarding incriminating evidence. As these three accused disclosed before the Court that they did not want any witness to be examined and also did not step into witness box for giving evidence on oath, the learned Addl. Sessions Judge, after giving opportunity of hearing to the learned advocates appearing for the parties, convicted the appellants vide impugned judgment and order giving rise to prefer the afore referred criminal appeals.

5. It is required to be noted that all the three appeals (applications) were sent by the appellants through jail authorities into the registry of the High Court and same were numbered and handed over to learned counsel, Mr.S.R.Divetia, for representing the appellants.

6. When these appeals came up for admission, we have heard learned counsel for the

appellants, Mr.S.R.Divetia, at length. He mainly argued on the basis of papers provided by the office to him and also on the basis of original record of the case provided by this court. Learned APP, Mr.R.C.Kodekar, also argued on behalf of the respondent-State.

7. In this case, learned counsel for the respective parties mainly relied upon the evidence of two eye witnesses namely, Bhuvansing Shankarbhai Naik, P.W.No.1, Ex.29, son of the deceased, complainant and eye witness as well as Jetliben, widow of Shankarbhai, P.W.No.2, Ex.31.

8. Prosecution witness No.1, Bhuvansing Shankarbhai Naik who has been examined at Ex.29 has narrated the incident in detail in paragraph 2. He deposed that incident took place at about 5.00 p.m. when his mother was preparing food and father was sitting on charpai and at that time Virsing, Karashan, Andarsing and Valsing came there

with deadly weapons in their hands. Regarding weapons, he deposed that Karshan and Virsing were having axe, Andarsing was having vansi (dharia) and Valsing was having bow. They called father of the complainant a witch and stated that as a witch he had killed their five bullocks and three sons and, thereafter, Karshan gave axe blow on the forehead, Virsing gave axe blow on the chest and Andarsing gave vansi (dharia) blow and Valsing gave arrow blow to his father. He further deposed that he tried to save himself by hiding in a dig while his mother hid herself in the corner of the house. Had she not done so, her mother would also have been killed. Thereafter they left the house. He thereafter went to Kwat Police Station and lodged complaint Ex.30 which was recorded by PSI. He identified all the three accused in the court also. He also identified the muddamal articles. He further deposed that even place of scene of offence

was shown by him. He further deposed that accused are his neighbours. Witness was thoroughly cross examined by the learned advocate for the accused. On minutely going through the detailed cross examination of this witness, nothing came out affecting the say of the prosecution. Moreover, there is no cross examination on material point more particularly presence of the accused, identification of the accused, weapon held by them at the time of incident and the way in which the incident has taken place. The prosecution has proved the complaint Ex.30 through this witness and exactly same version given in the complaint has been given by him.

9. Another eye witness-Jetliben, mother of the complainant and widow of the deceased, who was examined at Ex.3l also deposed on the same line and nothing came out from her cross examination also. Therefore, practically oral evidence of both the eye

witnesses remained unchallenged.

10. It is true that panchas of panchnama Ex.33 i.e. P.W.Nos.3 and 4, Exs.32 and 34 respectively did not support the say of the prosecution but same has been proved by the prosecution through the evidence of Police Officer. Not only that, evidence of eye witness got support from the evidence of P.W.No.7, Dr.Bharatbhai Jagannatbhai Patel, the doctor who performed the post mortem of the deceased. He narrated the injury received by the deceased in his post mortem report Ex.21. Same version has been given by him in para 6 of his deposition which shows that in all, three external mark of injuries were received by the deceased as a result of assault by the accused. In paragraph 8, he categorically deposed that all the injuries were ante mortem. He also narrated the internal injuries in para 9 which are two in number and which have been connected with the external injuries. He

also deposed regarding the cause of death in paragraph 10. He specifically opined in paragraph 11 that the injuries mentioned in column No.17 of the post mortem note are possible by way of sharp cutting instrument like the muddamal axe. He also proved the post mortem note Ex.21. He categorically denied the suggestion put forward in his cross examination by the learned advocate for the appellants that injuries of this nature can be caused if a person falls down on any sharp edged stone at a height of 3-4 feet. He also categorically denied the further suggestion that injuries Nos.1 and 2 described in column No.17 are possible if a person falls down while running. In cross examination also, he stuck to his version that injuries mentioned in column no.17 are possible by way of muddamal. To the last question asked to him that his report did not mention that all the injuries were possible by axe, he replied in affirmative

and stated that he was deposing this based on his experience and after verifying the weapon.

11. It may be stated that last suggestion put to this witness is not required to be reproduced by the doctor in the post mortem note. Except that, there is no suggestion put to the doctor as to who performed the post mortem. Over and above, FSL report, panchnama of scene of offence and inquest panchnama also support the say of the prosecution.

12. In short, prosecution is able to prove the case against the appellants beyond reasonable doubt. Presence of appellants accused along with deadly weapons has been established with their specific respective role by the detailed depositions given by the complainant as well as his mother more particularly regarding the blows inflicted on which part of the body, etc. This is also supported by the medical evidence as well as

the FSL report. Moreover, seizure panchnama shows that bloodstain was found on various muddamal as well as axe.

13. It may be noted that in this incident, the complainant is the son of the deceased as well as the eye witness and Jetliben is the widow of the deceased. This means both the eye witnesses are nearest relatives of the deceased and there are no other eye witness examined by the prosecution. Hence, this Court has to see whether their evidence being the nearest relatives can be believed or not for basing conviction or not.

14. It is required to be noted that incident in question took place at the residence of deceased in the evening hours. At that time, P.W.No.2-Jetliben, widow of the deceased, was preparing food, complainant-son was present in the house and deceased was sitting in charpai. Therefore, their presence is quite natural at the time of incident. When incident has been taken place

in their house and also when the accused are neighbours, no other eye witnesses except the relatives or the neighbours can be expected to be present there. In this case, incident has been taken place in the house and assailants came to their house along with deadly weapons and assaulted the deceased killing him on the spot. In these circumstances, merely because they are relatives of the deceased, their evidence cannot be discarded. However, the Court must be more vigilant while evaluating the evidence of these witnesses.

15. On an evaluation of the evidence of the aforesaid two witnesses from all angles, we are of the opinion that the witnesses get support from the medical evidence of doctor as well as from scientific expert i.e. FSL analyst. Complaint Ex.15 has also been ultimately proved by the prosecution. Apart from the above, even motive has also been established.

16. From the aforesaid, it is clear that case against the appellants-accused has been proved by the prosecution beyond reasonable doubt and, therefore, we are of the view that judgment and order of conviction rendered by the learned Addl. Sessions Judge being just, legal and proper does not require to be interfered with.

17. We are not discussing the evidence of each witness in detail in view of the observations made by the Hon'ble Apex Court in the case of STATE OF KARNATAKA VS. HEMAREDDY reported in AIR 1981 SC 1417 which reads as under:-

> "....This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudry (1967) 1 SCR 93: (AIR 1976 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

18. Under the above circumstances, these appeals are required to be dismissed.

19. These appeals are accordingly dismissed.

20. Office shall keep a copy of this judgment and order in each appeal.

(R.P.DHOLAKIA,J.)

(S.D.DAVE,J.)

radhan/